SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 449.

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

vs.

HANCOCK TRUCK LINES, INC.

Appeal from the District Court of the United States for the Southern District of Indiana.

REPLY BRIEF FOR APPELLANT.

B. W. La TOURETTE,
G. M. REBMAN,
818 Olive Street,
St. Louis, Missouri,
Counsel for Appellant.

HOWELL ELLIS,
520 Illinois Building,
Indianapolis, Indiana,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 449.

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

vs.

HANCOCK TRUCK LINES, INC.

Appeal from the District Court of the United States for the Southern District of Indiana.

REPLY BRIEF FOR APPELLANT.

STATEMENT AS TO ORDER OF SUBJECT MATTER APPEARING HEREIN.

Appellant in its reply brief has discussed only such subject matter as appears in Appellee's brief.

The arrangement of the subject matter as well as the topical headings follows the same arrangement and order as appears in Appellee's brief.

JURISDICTION.

Appellant, at pages 2 to 4, inclusive, of its opening brief sets forth a statement of grounds upon which jurisdiction of this Court is invoked. Appellee now raises the question that our appeal was not timely taken under the provision of the Urgent Deficiencies Act of October 22, 1913, C. 32, 38 Stat. 220, Section 47, 47a, Title 28 U. S. C. A. As is obvious from Appellee's brief they have failed to consider the effect of the provisions of Section 47a, supra, upon the appeal time allowed an aggrieved party from a final judgment or decree of the District Court in the cases specified in Section 44 of this Title. The provisions of said Section 47a are clear and specific as to the time within which an appeal may be taken, said section providing that an aggrieved party may appeal "within 60 days after the entry of such final judgment or decree." It is undoubtedly this oversight as to the provisions of Section 47a which has lead Appellee into the error of asserting that the appeal was not timely taken.

Appellee states that this appellant has no standing in this Court because it is not an "aggrieved party" within the meaning of Section 47a. In Appellant's statement of grounds upon which jurisdiction of this Court is invoked, and at page 4 of its opening brief, the following statement appears:

> "The jurisdiction of the Supreme Court of the United States is further invoked on the grounds that this Appellant participated in the proceedings before the Interstate Commerce Commission and is a party in interest therein; that the order of the Commission issued in the said proceedings has been vacated and set aside and the enforcement thereof is permanently enjoined by the findings of the lower Court herein. That by reason thereof Appellant is an aggrieved party within the meaning of Section 47 (a), Title 28 U. S. C."

To this jurisdictional statement we wish to add that Section 45a, Title 28 U. S. C. A., contains the following proviso:

"Provided, that the Interstate Commerce Commission and any party or parties in interest to the proceedings before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: Provided, further, that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States. Mar. 3, 1911, c. 231, Sections 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, c. 32, 38 Stat. 220."

In view of the above-cited section of the Judicial Code, it will be clear to the Court that (1) Appellant is an ag-

grieved party within the meaning of Section 47a and (2) under the provisions of Section 45a may have an "appeal of right."

It is further clear that the case at bar is one of the nature referred to in Section 44, Title 28 U. S. C. A., which said section reads as follows:

> "(b) in respect to cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission (procedure) shall be as provided in sections 45, 45a, 46; 47, 47a and 48 of this title."

By reason of the quoted portion of Section 44, it is obvious that Sections 45a and 47a must be construed together.

Accordingly we submit that the Court should rule this point against Appellee.

Appellee has attacked our standing in this Court. Similar attack was made at the time intervention in the Court below was sought by this Appellant, but not on the grounds now raised.

As to the contention of Appellee that we have filed no pleadings in this cause and have tendered no issues, we differ. The record (R. 60) shows our filing of a "Petition for Leave to Intervene" on April 8, 1944, and on the same date said petition was granted (R. 61). Said petition states our interest in the cause and, by implication, at least, adopts the pleadings of the Interstate Commerce Commission and of the United States. Leave to file answer was prayed and tender thereof made, but leave to file the same was denied upon the objection of Appellee, plaintiff below. The Appellee, under the circumstances, is estopped from raising objection to our appearance herein:

> (1) by reason of its failure to timely raise in the Court below the objection which it now argues;
>
> (2) by reason of its action in objecting to our filing formal answer.

As to our right to appear herein, we submit that we have such right by virtue of Section 212 of the Judicial Code, 28 U. S. C. A. 45a, supra, and by virtue of Rule 24 of the Federal Rules of Civil Procedure, with respect to intervention.

Having shown our right to participate in these proceedings under Section 45a, Title 28 U. S. C. A., supra, we clearly come within the provisions of Rule 24 of the Federal Rules of Civil Procedure dealing with the right of intervention. It is our position that Section 45a, supra, confers on this appellant a statutory and absolute right to intervene. Section (c) of Rule 24 of the Federal Rules of Civil Procedure provides as follows:

> "The motion (for intervention) shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense, for which intervention is sought."

That we have substantially complied with the provisions of Subsection (c) of Rule 24, supra, is obvious from a reading of our petition for leave to intervene (R. 60). There we set out in Paragraph 2 our interest in the cause. In Paragraph 3 we set out the fact that we do not seek to broaden the issues involved in this proceeding. A reading of these two paragraphs of our "Petition for Leave to Intervene" definitely shows our position as opposing the complaint filed by Appellee in the Court below and the statement that intervenor does not seek to broaden the issues certainly connotes our intention of adopting the issues which were raised by the pleadings filed in this complaint by the other parties. That such "Petition for Leave to Intervene" fully and adequately complies with Section (c) of Rule 24, supra, is evidenced by the decision of the District Court of Kentucky in the case of Babcock v. Town of Erianger, 34 F. Supp. 293:

> "The pleading accompanying the motion to intervene should set up the interest of the party just as in an original bill."

Again, in the case of Mary C. Leary v. United States, 32 S. Ct. 599, this Court considered on appeal matters raised by a petition for intervention filed pursuant to Equity Rule 37, wherein the statement of intervenors' interest was set out in the petition for leave to intervene in the same manner as our interest in this cause is set out in our petition. In the case cited no separate pleading was filed. In view of the above and foregoing, and further in view of Appelle's failure to timely oppose our intervention for the reason that no formal answer was filed, we submit that the Appellee's position in this matter is untenable.

STATEMENT OF THE CASE.

This Appellant at pages 4 to 9, inclusive, of its opening brief, sets forth a detailed "Statement of the Case" which we submit correctly described the issues before the Court. Appellee suggests that Appellant failed to make a concise statement embracing all of the issues now for consideration by this Court. Much of its statement is devoted to matters purely argumentative in nature and relates to the report and order of the Interstate Commerce Commission, Division 4, entered May 16, 1942 (R. 99-105), which said report and order are not material to the issues here. The only report and order of the Interstate Commerce Commission in issue is that entered by the Commission en banc (R. 40-50), in which said report and order the operating authority of Globe Cartage Company, Inc., is limited to the transportation as a common carrier of general commodities except commodities in bulk and those of unusual length, width or weight, which are at the time moving on bills of lading of freight forwarders. We think no further comment necessary with respect to Appellee's so-called corrected Statement of the Case.

SPECIFICATION OF ASSIGNED ERRORS.

Appellee on page 12 of its brief cites our alleged error No. 4, which is as follows:

> "In refusing to adopt the findings of fact and conclusions of law submitted by the defendants."

Appellee states that it does not understand that we submitted any findings of fact or conclusions of law. We submit that the error of which we complain is the failure of the Court to adopt the findings of fact and conclusions of law submitted by defendants United States and Interstate Commerce Commission. Certainly in view of our being an aggrieved party, as previously shown, and considering our participation in the instant case as an intervening defendant, we occupy the same position with respect to the above alleged error as do Defendant-Appellants United States and Interstate Commerce Commission.

With reference to alleged error 16, page 12 of our opening brief, which Appellee next attacks in its answer brief, page 12, we submit that the alleged findings of fact and conclusions of law do not adequately state legal, cogent, or compelling reasons for the Court's decision or for its final decree entered herein for the reasons (a) that said findings of fact on their face sho that the Court below considered matters wholly immaterial and extraneous to the issues presented, in reaching its conclusions of law, and (b) that the Court below did not have before it the record made in this proceeding before the Interstate Commerce Commission and accordingly made findings of fact without the benefit of such record, from which alone it could determine the true facts of the case.

As to the alleged error 17 of this Appellant set out on page 12 of our opening brief, we submit that this Appellee has wholly failed in the Court below and again in its brief

filed herein to show that it was denied all its property without due process of law. Accordingly we submit that this action does not arise under the Fifth Amendment.

Further, on page 13 of Appellee's brief, it is stated:

> "That all of the remaining ones (alleged errors) depend for their vitality upon getting the Court to disregard the Commission's order of May 16, 1942, as suggested in alleged error No. 8, page 11 of its (Appellant's) brief."

With this proposition we shall treat subsequently in our brief. However, we wish to point out to the Court that it is not the position of this Appellant to have the Court disregard the Commission's order of May 16, 1942. Rather Appellee would have the Court consider the said Commission's order of May 16, 1942 as bearing upon the scope of the operating rights of Globe Cartage Company, Inc., whereas in truth and in fact the scope thereof is made the subject of the order of the Commission of August 4, 1943. We again repeat that the said order of May 16, 1942, did not deal in any manner with the determination of the scope of the operating rights of Globe Cartage Company, Inc., but rather with the matter of purchase by Appellee of whatever operating rights might finally be determined by the Commission to have been vested in Globe Cartage Company, Inc.

SUMMARY OF ARGUMENT.

(1) Appellant, by virtue of Section 212 of the Judicial Code, 28 U. S. C. A. 45a, is of right a party to this proceeding; its petition for intervention was duly filed in the Court below; its application for leave to file separate answer was denied by the Court below. Judicial Code 212, 28 U. S. C. A. 45a.

(2) It is elementary that presentation, argument or discussion of matters without merit is an imposition upon the Court, and failure to answer such matters does not constitute a waiver of the right of a party in interest to proceed on the merits of the case.

(3) The appeal was taken within the 60 days prescribed in the Urgent Deficiencies Act. 28 U. S. C. A. 47a.

(4) The ministerial Act of the Court in granting an appeal does not require the action of three judges. Section 28 U. S. C. A. 47, quoted by Appellee, has no application to the granting of an appeal from a final decree.

(5) Appellee has consistently confused and misinterpreted the effect of the order of the Commission, Division 4, issued under date of May 16, 1942. Appellee's confusion has led it and the Court below into patent error.

(6) The limitation order entered on August 4, 1943, is fully sustained by the facts of record before the Commission and is not only a lawful restriction, but is a restriction mandated by Congress in a proper case.

(7) The findings and order of the Commission, Division 4, entered May 16, 1942, was

(a) made on sole application of Appellee and its predecessor in interest;

(b) permissive only; authorizing not directing or requiring the parties to consummate their agreement

dated November 4, 1941, more than one and one-half months prior to application to the Commission for authority to consummate the transaction;

(c) not and could not be determinative of the scope or nature of operating rights to which Globe may have been entitled;

(d) careful to point out to Appellee that if authorized the transfer of "claimed rights," not "determined or confirmed" rights.

(8) The said findings and order of the Commission, Division 4, entered on May 16, 1942, could not and made no attempt to create or establish vested property rights in Appellee.

(9) The order entered on August 4, 1943, did not attempt to modify in any particular the authorization granted by the Division 4 order of May 16, 1942; said order of August 4, 1943, was not collateral to the proceedings before Division 4; said order of August 4, 1943, was entered pursuant to an application filed by Appellee's predecessor in interest and was determinative of the issues tendered by such application.

(10) Appellee does not complain, nor has it at any stage of these proceedings offered one scintilla of evidence that the proceedings of the Commission which culminated in the order of August 4, 1943, were had without affording to Appellee notice, opportunity to be heard, to present its evidence, to examine and cross-examine witnesses offered against it; Appellee has not complained that it was not afforded a fair and impartial trial.

(11) As pointed out in our brief heretofore filed, pages 14, 15, 20 and 21, Appellee has not only failed to offer evidence tending to prove that the facts before the Commission do not support the findings and order of the Commission under date of August 4, 1943, but Appellee has con-

sistently admitted that the findings of the Commission are fully supported by the facts of record.

(12) The Appellee has wholly failed to prove by any evidence of record that the enforcement of the Commission's order of August 4, 1943, would deprive it of its property without due process of law, in violation of the Fifth Amendment, and in violation of Sections 206 and 216 (a) (d), Part II, of the Interstate Commerce Act.

(13) The sole and only issue before this Court is the legality and propriety under the facts of that part of the Commission's order of August 4, 1943, restricting and limiting the certificate granted on the Globe "grandfather rights" to the transportation of general commodities "which are at the time moving on bills of lading of freight forwarders."

(14) The Court below substituted its judgment for that of the Commission in that it found that "that part of the order complained of herein is not sustained or justified by any fact found by the Commission" and sought on that basis alone to void the Commission's order, without remanding the cause to the Commission.

(a) The facts of record before the Commission were not before the Court below, hence the Court had no alternative other than to remand the cause, instructing the Commission to proceed in its determination of the cause in a manner in keeping with the Court's statement of the law.

(b) The Court by entering its order and decree usurped powers and jurisdiction committed by Congress solely to the Commission.

JURISDICTION.

Appellee in its brief cites the case of City of Chicago v. Chicago Rapid Transit Co., 284 U. S. 577, 52 S. Ct. 2, stating that it is unable to distinguish said case from the case at bar. Appellee has apparently failed to understand the reasoning of the Court in the Chicago case, supra. The facts in the Chicago case briefly are, that the Chicago Rapid Transit Company sued to enjoin the Illinois Commerce Commission and the Attorney General of the State of Illinois from enforcing a rate order entered by the Illinois Commission. A three judge Court entered a final decree wherein it enjoined the Illinois Commerce Commission and the Attorney General from enforcing the order complained of. Neither of the two defendants appealed from the decree, which this Court said was "a final adjudication of the invalidity of the rate order." Obviously the order became final upon a failure of either the Illinois Commerce Commission or the Attorney General to appeal. There was no order from which the City of Chicago could separately appeal. The Supreme Court could not take jurisdiction of the matter, except on an appeal by the parties specifically enjoined. Had the Illinois Commission and the Attorney General, or either of them appealed, it is obvious from a reading of the above decision that the City of Chicago's appeal would have been entertained by this Court. Further the case cited by appellee is not one within the purview of Section 45a, Title 28, U. S. C. A., as is the case at bar.

Appellee then cites the case of Atles v. United States, 50 Fed. (2d) 808, alleging that appellant herein is a stranger to the judgment below. Section 45a, supra, sufficiently described the position of appellant herein as being a party to this proceeding and removes any doubt which may exist as to our right to appeal. Certainly under said Section 45a, supra, this appellant is not a stranger to this

proceeding. The contention of appellee that appellant has not shown that it was recognized as a party to the proceedings in the Court below is a falsification of the record in this case (R. 61) wherein it is pointed out:

> "(Entry for April 8, 1944, continued) which said petition (Petition for Leave to Intervene) is granted and the Regular Common Carrier Conference of the American Trucking Associations, Inc., is given leave to intervene as a party herein" (R. 61).

As to the case of Atles v. United States, supra, even a casual reading of said case will disclose that it is not applicable to the case at bar for the following reasons:

(a) In the Atles case, supra, Jennie Atles sought to appeal from a decree which admittedly was not adverse to her, nor in any wise affected either her or any right which she had; whereas in the instant case, this Appellant has shown an interest in the cause, has shown that the decree of the Court below was adverse to such interests. The Appellee has not once in this proceeding, whether before the Commission or the Court below, questioned or denied our interest herein. Under familiar rules, Appellee is now in no position to complain or raise such issue, as it has by its previous silence admitted our interest.

(b) This appeal arises and the Court has jurisdiction thereof by virtue of the provisions of Sections 45a and 47a, Title 28, U. S. C. A., supra; such sections were not applicable to the Atles case, supra.

In its brief, at page 20, appellee states, "Appellant has waived its right to be heard in this cause; our Statement Opposing Jurisdiction in this Court was filed on August 2, 1944; no answer has ever been made thereto by this Appellant, although Rule 7 (3) clearly contemplates that when a jurisdictional question is presented as provided by Rule 12, paragraph 3, the appellant shall file a brief opposing same." Appellee has obviously misconstrued

the Rules of this Court and more particularly Rule 12 (3), which says in part:

> "where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

Nowhere in the Rules of this Court do we find a Rule requiring an Appellant to oppose such motion. We elect to stand upon our jurisdictional statement and submit that "Appellee's Statement Against Jurisdiction of the Supreme Court and Motion to Dismiss or Affirm" is so replete with obvious error and misconstruction of the law as not to require specific answer. Under the statutes cited in our Jurisdictional Statement, and by virtue of the provisions of Section 45a, Title 28, U. S. C. A., we submit that this Court has jurisdiction to hear and try the appeal herein.

Granting of Appeal by Single Judge.

Appellee has spent a considerable portion of its brief to a discussion of matters which it contends prove a lack of jurisdiction in this Court over the appeals herein. As previously indicated this argument and discussion of Appellee has little or no merit. For this reason, as above pointed out, we had not considered it necessary to discuss any of the matters which Appellee raised in its "Statement Against Jurisdiction."

We cannot at this point, however, refrain from briefly discussing the untenable position which Appellee takes with respect to the fact that the appeal herein was granted by a single judge. Not one portion of Appellee's argument sustains its position. Appellee cites Section 47 and several cases as supporting its position. All of the cases cited refer to the doing of purely judicial acts, matters requiring the exercise of a discretion by the Court. Certainly as to the exercise of a discretion in matters properly before a three judge court, all three judges must be sitting and pass upon them. However, since under Sections 47 and 47a, supra, the granting of an appeal is a matter

as of right, the Court has no discretion to exercise, Congress has exercised it and delegated the performance of a purely "ministerial" act to the Court. The convening of three judges to sit and grant an appeal under such circumstances was not and could not have been contemplated by Congress, for it would entail a needless loss and waste of time and expense. It would be an extravagance not required by law.

Appellee in this portion of its brief refers to a petition filed in the lower Court asking the Court to vacate its judgment of May 25, 1944. We shall discuss this matter insofar as it affects this appeal, under our next heading.

This Appeal Was Taken Within the Statutory Time.

We feel that counsel for the United States and the Interstate Commerce Commission have fully and ably briefed this matter and specifically adopt such portion of their brief as our own, inasmuch as we do not desire to burden this Court with repetitious matter.

We do, however, point out that Section 47a, Title 28, U. S. C. A., specifically provides that an appeal may be taken "within sixty days after the entry of such final judgment or decree."

The language of a statute could not be clearer than that above quoted. As to the matter of filing of a petition to set aside and vacate the Lower Court's Decree, such action and any admissions therein made could in no wise affect the jurisdiction of this Court, for the jurisdiction is plainly fixed by the above statute; further, the matter which Appellee sets out in its brief is dehors the record. It is elementary that this Court will not consider matters outside the record.

We do not, as Appellee contends, claim that the appeal time had expired. Any and all explanation of our position is found in Section 47a, Title 28, U. S. C. A., which we reiterate is plain, concise and clear as to the sixty days time within which to appeal.

ARGUMENT ON THE MERITS.

Appellee in its brief states that "Appellant does not present the case that was tried below, nor state the question which must be decided in this appeal." The position which Appellee takes herein is difficult to understand considering that the sole complaint which Appellee made in its Complaint before the Court below was that the order of the Commission under date of August 4, 1943, restricting Appellee to the "transportation of general commodities that are at the time moving on forwarders' bills of lading" is illegal and void as exceeding the power and authority delegated to the Commission by Congress for the reason that:

"(a) The Commission having found as a fact that the applicant, Globe Cartage Company, Inc., predecessor in interest of plaintiff, was a common carrier by motor vehicle and as such was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes and within the territory described in number 6 of this complaint, and for which an application for a certificate had been made as aforesaid, and had so continuously operated since that time, it was the statutory duty of the Commission to issue a certificate of public convenience and necessity to such applicant, or to this plaintiff as its successor in interest, without further proceedings, and without inserting either in the order therefor, or in such certificate, the words 'which are at the time moving on bills of lading of freight forwarders,' and the Commission had no power, right or authority to insert and include said words in said order, or to include the same in the certificate when issued.

"(b) The inclusion of said quoted words in said order, and in said certificate, is an unlawful and illegal restriction against and constraint upon plaintiff, not authorized

by law, and is an unjust, unreasonable and capricious limitation upon the rights, privileges and duties of the plaintiff as a common carrier of general commodities by motor vehicle for compensation, and will deprive plaintiff of its rights and property without due process of law in violation of the Constitution of the United States and the Fifth Amendment thereto.

"(c) The attempt by the Commission to limit the operations of the plaintiff by the terms of said order to commodities which are at the time moving on bills of lading of freight carriers, is an illegal and unreasonable limitation and restriction, and is a violation of that part of Section 206 of said Act which mandates the Commission to issue such certificate, without further proceedings, where, as in this case, the Commission found as a fact that Globe Cartage Co., Inc., was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes designated, and had so operated since that time, and upon such findings of fact, the Commission had no power, authority or discretion under said act to make any order, or embody within such certificate, a provision limiting the rights and duties of such common carrier to commodities at the time moving on bills of lading of freight forwarders; such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against the plaintiff as a common carrier by motor vehicles, and is contrary to public policy."

Since Appellee did not choose to introduce before the Court below the record made before the Commission in the matter of Globe Cartage Co., Inc., common carrier application, the sole and only question presented is that raised by the Complaint filed by Appellee in the Court below, namely:

The question of the authority and power delegated by Congress to the Interstate Commerce Commission to place a limitation or restriction upon a certificate isued to a common carrier in a "grandfather" proceeding, limiting the type of service to be performed to the transportation of general commodities that are at the time moving on forwarder's bills of lading.

The above is the only question presented. In determining this issue this Court is confined under the pleadings in this case and the record made before the District Court, to a consideration of the main question above, and to the collateral issue that the findings of the commission in its order of August 4, 1943, do not warrant or authorize the restriction placed on the authorized certificate. This latter issue necessarily arises out of the main issue.

We submit that we have discussed these issues fully in our opening brief. However, in view of the nature of appellee's argument, as well as the many collateral issues which it raises, we feel constrained to discuss certain phases of appellee's brief at length, even to the point of being charged with repetition of matters set out in our opening brief. If such latter be the case, we ask this Court to be indulgent and bear with us.

The Order of May 16, 1942.

So as not to add to the confusion created by appellee's fanciful discussion of purely fictitious issues, appellant shall treat of the argument set forth in appellee's brief in the same order in which said argument is therein set out.

Appellee states at page 27 of its brief, "In order to better understand our contention concerning the consideration to which appellee is entitled by reason of the peculiar facts in this record," it then goes on to cite reasons as to why it sets out in three and one-half pages of its brief, pages 27-31, a "summary" of certain facts allegedly found by Division 4 of the Commission in a proceeding brought by

appellee to acquire whatever operating authority Globe Cartage Co., Inc., may have been found to be entitled to by reason of a "grandfather" application then pending before the Commission.

We submit that the order of May 16, 1942, is not in issue in this cause, that it is wholly immaterial, irrelevant and extraneous to any issue tendered by the pleadings in this cause in the Court below.

We would be content to dismiss the statements in appellee's brief on this point with the above statement, except for the confusion and resultant error into which the Court below was led by reason of appellee's insistence of this point.

Appellee in its brief, page 31, says that "the lower Court found as a fact that following said findings and order of the Commission of May 16, 1942, appellee, Hancock Truck Lines, Incorporated, in reliance on such findings and order, paid to Globe said $9,900.00, the balance of the purchase price for such common carrier operating rights." In the above short sentence, which is a restatement of Finding No. 16 of the Findings of Fact of the Court below, no less than two errors are apparent; the first, that Hancock, "in reliance on such findings and order, paid to Globe said $9,900.00." Having a consideration for the nature of the proceedings out of which said order of May 16, 1942, emanated, the Court below indiscreetly used, as does this appellee, the words "in reliance." A more correct terminology would have been by virtue of the "authority" or "permission granted to Hancock, it paid to Globe voluntarily, of its own free will, with its eyes open (to use the language common to all) said $9,900.00." Appellee would have this Court believe, as it apparently erroneously convinced the Court below, that the Commission's Order of May 16, 1942, compelled it to pay said $9,900.00 to Globe; in fact, at pages 35-36 of appellee's brief it is said that "the order entered under Section 5 (May 16, 1942) was

very comprehensive, and not only impliedly authorized, but directed, appellee to pay Globe $9,900.00 for its common carrier operating rights." This is not true, since Section 5 provides for the granting of permissive authority only.

The order of May 16, 1942, if it **directed** appellee, was illegal and void as exceeding the authority delegated to the Commission. This Court has recognized the "permissive" language of said section. U. S. v. Resler, 61 S. Ct. 820, 313 U. S. 57, 85 L. Ed. 1185. But let us look at the "compelling" or "directing" language of the order of May 16, 1942 (R. 104). First, however, let us turn to the language employed by the Commission in its report on said proceedings (R. 104):

> "provided, however, that, **if the authority herein granted is exercised.**"

Now to the order itself (R. 104-105):

> "It is further ordered that **if the parties to the transaction herein authorized desire to consummate same,** they shall (1) notify this Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.
>
> "It is further ordered **that unless the authority herein granted is exercised within six months from the date hereof, this order shall be of no further force and effect.**"

More, we cannot say.

The second patent error in the statement taken from page 31 of appellee's brief, and which statement the Court below made in its Finding of Fact No. 16, is contained in the phrase "for such common carrier operating rights."

The order of the Commission, Division 4 (R. 99-105) contains the following language: (1) Only such "'grandfather' common-carrier rights which **may be** confirmed as a result of those applications." (Applications filed by Globe under Section 206 of the Motor Carrier Act, as amended by the Transportation Act of 1940, Section 306, Title 49, U. S. C. A.).

(2) "The nature and extent of the service which Hancock may render in conducting operations under the unified rights must be governed by the existing rights as confirmed and lawfully claimed" by Globe.

(3) "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act, except section 5 thereof, as expressly determined herein."

If the above quotations from the Report and Order of Division 4 of the Commission do not convict appellee, as well as the Court below, of error, it is submitted there is no error.

Appellee at its own risk and upon its own initiative undertook to complete the transaction which it had entered into some six or more weeks prior to petitioning the Commission for permission therefor, with full, adequate and complete warning that Globe's rights, if any, were still subject to determination by the Commission under another "section of the Act," being Section 206. Appellee thus voluntarily placed itself in the position whereby it has suffered or will suffer the damage which it alleges. Under the circumstances, Appellee cannot be heard to complain. The law speaks of such position tersely—"damnum absque injuria." A loss, self-induced, for which the law does not, because it cannot, in justice, afford a remedy.

Granting that no issue of fact was tendered respecting said alleged damage; granting that such damage will occur, if the Commission is sustained, as it should be, we again submit that any matter, any evidence, and any argument respecting the order of May 16, 1942, and the effect thereof, is wholly immaterial and extraneous to the issues which not only were tendered, but which only could be raised in this proceeding.

As to Estoppel.

In view of what has been said in our opening brief, we submit that estoppel cannot be asserted against the Government, nor any of its agencies.

However, if such defense were able to be urged, we submit for reasons set out in our discussion respecting the order of May 16, 1942, that such defense is not available to this Appellee.

We shall not treat of this question further, believing as we do that it is not properly an issue in the instant cause.

Part of Commission's Order Complained of Does Not Violate Fifth Amendment.

Appellee in its brief seemingly admits a familiarity with the distinction which exists between proceedings under Section 5, being acquisition proceedings, and proceedings under Section 206, in the nature of a "grandfather" proceedings. As Appellee has tersely stated it, "the issues are entirely different." Admitting this as Appellee does, it then falls into the error of "confounding and intermingling" the order of May 16, 1942, a Section 5 order, with the order of August 4, 1943, an order entered pursuant to the "grandfather" clause of Section 206.

The error is the result of considering the order of May 16, 1942, as having "furnished the foundation for the creation of certain property rights," and as having "directed that certain things must be done by appellee." As to the

effect of the May 16, 1942, order furnishing the foundation for the creation of certain property rights, we reiterate that the Commission in its said order consistently termed the Globe rights which Appellee had contracted to acquire and for which acquisition it sought the Commission's consent or permission, as "claimed rights" and as pointed out above, the Commission was over zealous to point out that its May 16, 1942, order was not to be "construed as a determination of the operating rights of any person or persons." This precaution was taken by Division 4 of the Commission in the face of the record facts that both Hancok and Globe were controlled by the same person, Major A. Riddle (R. 100), who is charged with a knowledge of the extent of Globe's "grandfather" rights and who fully understood the effect of the "grandfather" clause upon such rights. If, however, it is claimed that Appellee by reason of the unauthorized expansion of the Globe rights after the May 16, 1942, order of Division 4 of the Commission, acquired "certain property rights" in and to such unauthorized expansion, further error has been committed by Appellee, for it well understood that the Globe "grandfather" rights had not as then been determined, and, further, it knew or should have known that unauthorized operations cannot be claimed as the basis for operating authority under the "grandfather" clause.

As to the Contention of Appellee That Division 4 of the Commission by Its Order of May 16, 1942, Directed That Certain Things Must Be Done by Appellee.

We submit that we have made sufficient answer to said contention in a previous portion of our rely brief.

The Appellee contends that the Commission En Banc in its report and order of August 4, 1943, collaterally set aside the order of Division 4 of the Commission, made on May 16, 1942, contrary to the provisions of Section 5 (9).

A reading of the Transportation Act of 1940, which amended the Motor Carrier Act of 1935, and more particularly a study of the provisions of Section 206 particularly as they relate to "grandfather" cases, and a comparison of said provisions with Section 5 of the Act and more particularly of Section 5 (9) will clearly show what we have contended in our opening statement, namely: that proceedings under the two sections are entirely separate and distinct and have for their purpose entirely different aims and ends. We feel that we have discussed this distinction sufficiently in our opening brief, and that further discussion and argument is unnecessary.

Appellee contends that it had no notice and no hearing respecting the action of August 4, 1943, taken by the Commission En Banc. We may pass over this contention at this time for the reason that such issue was not tendered in the Court below. Further, for the reason that the record made before the Court below as well as the record before the Commission is absolutely devoid of any evidence tending to prove that the action of the Commission En Banc, under date of August 4, 1943, was taken without notice to Appellee. The said action of the Commission En Banc, under date of August 4, 1943, with reference to the determination of the operating rights of Globe was taken as a further and final step in the proceedings instituted by the said Globe, predecessor in interest to Appellee, under Section 206 of the Transportation Act of 1940, and more particularly under the "grandfather" provisions thereof, so that the finding of the Commission in said order of August 4, 1943, was grounded entirely upon what the record evidenced before the Commission in this proceeding, as to the operation which was performed by Globe on, prior and subsequent to June 1, 1935. The Commission in its said order of August 4, 1943, was not required, as Appellee contends it was, to make any finding as to consistency with the public interest, or as to what

was just and reasonable. This action of the Commission was, as we pointed out in our opening brief, taken by it pursuant to the mandate of Congress as set out in Sections 206 and 208 of the Transportation Act of 1940. In view of the above circumstances, the language of this Court in the McClean Trucking Company Case, 321 U. S. 67, has no bearing whatsoever upon the issues in this case.

Much of the argument set out on pages 38 and 39 is wholly immaterial to the issues presented in this case, and certainly does not afford any answer to the "question actually presented" as set out on page 27 of Appellee's brief. For the above reasons, we will not discuss this matter further except to reiterate a statement previously made in this reply brief respecting the effect of the order of May 16, 1942, as being a vested property right of Appellee. We have previously challenged a similar statement, and again challenge the Appellee's statement herein for the reason that the said order of May 16, 1942, could not, under the law, vest in the Appellee any property right of any nature whatsoever, the said order of May 16, 1942, b ing purely a permissive order.

We conclude from the above that this Appellee was not deprived of any of its property without due process of law. In fact, the record made before the Commission in the Globe proceedings clearly demonstrates that Globe usurped and sought in an unauthorized manner to invade upon the property rights of others, for, as frequently pointed out in our brief, the Globe operation on and subsequent to June 1, 1935, and even as late as May 16, 1942, was an operation confined solely to the transportation of general commodities that were at the time moving on forwarder's bills of lading. As we have pointed out in our opening brief, the Appellee, in various of its briefs and arguments made before the Commission, admits that such was the fact. Appellee at this juncture makes no attempt to explain away its admissions for the reason that the

record admits of no explanation. For all of the above and foregoing reasons we submit that the requirements of the Fifth Amendment to the Constitution have been fully complied with and met in the instant case, so far as the Appellee is concerned.

Part of the Commission's Order Complained of Does Not Violate Section 206 (a).

Appellant feels that it has discussed this phase of the case more than adequately in its opening brief. However, inasmuch as it is this question, and only this question, which is properly before the Court, we feel constrained to add briefly to the statements in our opening brief. The Appellee seems to be of the opinion that the language of Section 206(a) which authorizes the Commission and directs it in a "grandfather" case to issue "such certificate without requiring further proof that public convenience and necessity will be served," requires the Commission without a hearing to issue to Applicant, solely upon the unproven allegations contained in its application, a certificate of public convenience and necessity. Under the Appellee's interpretation of this Section 206(a), it would have been possible for every motor carrier making an application thereunder to have claimed an operation as extensive and broad as the United States authorizing him to perform and carry on a transportation service as broad as he desired without any further proof on the part of such Applicant that he was "in bona fide operation as a common carrier by a motor vehicle on June 1, 1935" [Section 206(a)]. Certainly, Appellee's position is ridiculous and absurd when we consider the above. The Congress in legislating on the subject could not have intended any such result. As a fact, the language of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940, belies the position taken by Appellee. In addition to the above, Appellee completely overlooks

the language of Section 208 which must be read in pari materia with the language of Section 206(a). This Section 208 imposes upon the Commission in the issuance of a certificate the duty of limiting such certificate, in this language:

> "Any certificate issued under Section 306 or 307 shall specify the service to be rendered."

Further, said Section provides:

> "and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the **privileges** granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

True, in a "grandfather" case the Commission is not permitted under Section 206(a) to inquire into the question of public convenience and necessity for the act definitely provides that operations conducted on June 1, 1935, are conclusive evidence of the public convenience and necessity. It is only such proof, namely: proof that goes to the question of public convenience and necessity, that is dispensed with in a "grandfather" case under Section 206(a). Further than that, the Applicant is required by the Act, as well as by the rules and regulations issued and promulgated by the Commission, to substantiate its claims as to territory, as to routes, and as to services rendered, by definite and unequivocable proof of its operations on June 1, 1935, and subsequent thereto. We have in numerous places in our opening brief pointed out that the record made before the Commission, which record was not introduced before the lower Court, clearly shows that the limitation imposed upon the certificate granted Appellee growing out of the Globe operations was supported by the facts before the Commission.

To shorten our brief without necessarily detracting

from its forcefulness, we feel that the above statement has furnished sufficient answer to the argument set out on pages 43, 44 and 45 of Appellee's brief under the heading, "Void part of Commission's order complained of is capricious and unreasonable."

We submit that all that has been said herein, as well as matters set out in our opening brief, fully and completely answers these objections of Appellee. (Sea Train Lines, Inc., Common Carrier Application No. W-543, decided upon hearing and reconsideration by the Interstate Commerce Commission under date of February 6, 1945 [.... W. C. C. ....].)

Part of Commission's Order Complained of Is Violative of Section 216(d).

The Appellee in its brief for the first time in this case raises the issue that the restriction placed upon the certificate growing out of the Globe operations is violative of Section 216(d) of the Motor Carrier Act, 1935, as amended by the Transportation Act of 1940. Section 216(d) being the same as Section 316(d), Title 49, U. S. C. A., refers to, as its heading shows, undue preferences or prejudices prohibited. The scope of Section 316, Title 49, U. S. C. A., is "rates, fares and charges." We submit that not only is this charge set out on page 42 of Appellee's brief untimely raised, but it has no application or materiality to the issues in this cause and accordingly we submit that the Court cannot consider same.

Judgment of District Court Is Violative of Commission's Administrative Functions.

Appellant has discussed this subject matter at some length in its opening brief. However, to clarify such discussion if need be we submit that the District Court in setting aside the limitation imposed by the Commission

in its August 4, 1943, order and in effect writing a new certificate for Appellee as successor in interest to Globe invaded upon the province committed solely to the Interstate Commerce Commission by Congress. Certainly the Court below, as we have so frequently pointed out, did not have the facts before it which the Commission had of record in the Globe case. Under such circumstances the Court could not advisedly or otherwise find as a fact that the Globe operations were other than as defined in the Commission's order of August 4, 1943. It is the settled law announced by this Court that under the circumstances which prevail in this case, the Court below was limited to a determination as to whether or not the findings of the Commission as expressed in its report substantiated the order entered. This the Court was unable to do because it did not have the record before it. Under the circumstances a remand of the case was the only proper order for the Court to have entered had it determined the case favorably to Appellee. We submit, however, that the Court committed additional error and that its judgment and decree was for the wrong party.

Waiver.

On pages 48 to 51, inclusive, of Appellee's brief, Appellee goes into considerable discussion as to its waiver of the objection to the restriction imposed by the Commission's order of August 4, 1943. We submit that whether the action of Appellee before the Commission be called waiver or be denominated by any other term, the Appellee has failed to exhaust its remedies before the Interstate Commerce Commission which, as this Court has so frequently said, is a condition precedent and an absolute prerequisite to the seeking of injunctive relief in a Court of law.

Under such circumstances, considering the facts of record before the Commission in the Globe case, which facts

this Appellee has not once contended support any finding other and different from that made by the Commission in its order of August 4, 1943, as well as the admissions of such facts as made by this Appellee in various of its briefs and petitions filed before the Interstate Commerce Commission, which said petitions and briefs are set out in full in the record in this case, we submit that Appellee is now estopped from raising any question as to the limitation imposed by the Commission in its order of August 4, 1943.

On pages 51 through 54 of Appellee's brief, Appellee contends that the Commission did not find that Globe was not holding itself out to transport property for all shippers. We submit that the report and order of the Commission en banc under date of August 4, 1943, contains such finding of fact and said report and order contains the following language:

> "During this entire period, Globe has transported only traffic tendered to them by the Universal Carloading & Distributing Company" (R. 42).

We further submit that any further finding respecting a holding out was not only unnecessary, but would have been wholly improper in view of the admissions made by Appellee before the Commission that it did not so hold itself out, but that its "assumption during the grandfather period was to transport for freight forwarders" (R. 130).

Substantial Parity.

We submit that the argument made and discussion had in our opening brief adequately answers the brief of Appellee on this point. The cases therein cited are clear and convincing as to the injunction imposed upon the Commission by Congress of effecting and maintaining in a grandfather certificate a substantial parity between future operations and prior bona fide operations.

Finding No. 14.

The statement contained at page 30 of our opening brief adequately expresses our position with reference to the error which the Court below committed in its Finding No. 14, for the sole question in issue as raised by plaintiff's petition was as previously pointed out, the right of the Commission to limit or restrict the certificate issued by the Commission and growing out of the Globe operations. Certainly anything which may have been done subsequent to May 16, 1942. or any condition which may have obtained as well as any expansion which the Appellee may have undertaken as of May 16, 1942, or subsequent thereto could not in any way affect the certificate to which Appellee was entitled as successor in interest to Globe Cartage Company, Inc.

Findings Nos. 15, 16, 17 and 18.

Appellee in its brief, page 56, does not challenge the merits of our argument concerning the error of the Court below in making said findings in this case. Rather, Appellee states that "if such facts are immaterial, they can do the Appellant no harm." We submit that the Court based its decree at least in part upon such findings which, as we contend, were immaterial to the issues presented in this cause, for which reason as well as other reasons set out in our opening brief with respect to these findings the Court was in error.

Court Below Exceeded Its Jurisdiction.

Appellee, at page 56 of its brief, states that:

> "Appellant has not accurately stated the full measure of Appellee's attack on the order of the Commission on page 28 of its brief."

We challenge this wholly unfounded charge of inaccuracy. We further challenge this Appellee to point out to

this Court any other attack made in its petition upon the final order of the Commission under date of August 4, 1943. The attacking part of Appellee's petition in the Court below is contained in Paragraph 15 (a), (b) and (c) of its petition (R. 6 and 7). In view of such circumstance and of the restricted manner in which the Appellee challenges the Commission's order, we reiterate the statements set out in our opening brief on pages 27 through 34, inclusive. For the reasons therein set out, we submit that the Court very obviously not only exceeded its jurisdiction, but made findings without benefit of the facts as found before the Commission. Further from the evidence which the Court had before it, the Court's finding that the Commission had failed to find that the restriction complained of in the complaint is a reasonable term condition or limitation required by the public convenience and necessity is wholly unwarranted in view of all of the statements contained in the Commission's report and order of August 4, 1943. Further, the Court's finding that the Commission failed to find that it would be consistent with the public interest to place such restriction in said order is an error of law for the reason that the controlling sections of the Motor Carrier Act, 1935, as amended by the Transportation Act of 1940 do not require the Commission to make a finding of consistency with the public interest in a grandfather case relating to an alleged common carrier operation. The finding of the Court that the Commission failed to find that good cause exists for changing its order of May 16, 1942, is wholly without support from the evidence introduced in the Court below for the reason that no showing was made that the order of May 16, 1942, was changed. The Appellees have not only not introduced any evidence to show that the Commission changed its order of May 16, 1942, but also are incapable of producing such evidence.

The Court below further found that the Commission failed to find that it is just and reasonable to place such

restrictions in such certificate. In the Act, Sections 206 and 208 do not require any such findings and accordingly the Court erred in making this finding. The further findings cited on page 57 of Appellee's brief, numbered E through I, inclusive, definitely constitute error on the part of the Court below for the reason that the finding set out under Paragraph E is contrary to the evidence introduced before the Court below. The finding set out in Paragraph F of Appellee's brief is erroneous and is not supported by any fact of record before the Court below. Further, said finding is not a finding of fact but is a definite and obvious conclusion of law without support of record and contrary to the evidence introduced in the Court below. The finding set out under Paragraph G on page 57 of Appellee's brief again is wholly unwarranted from the evidence introduced in the Court below. The Appellee did not introduce either before the Commission or before the Court below any evidence whatsoever that such order complained of is discriminatory against the Appellee, and considering the admissions which Appellee made before the Commission and which were of record in the Court below, the Court's finding in this particular is not only not supported by the evidence before it but is absolutely contrary to it. The same can be said with reference to the findings set out under Paragraphs H and I, page 57 of Appellee's brief.

We submit that if the above mentioned errors do not constitute and point out mistakes of fact made by the Court below, it is impossible for a mistake of fact to exist in any case.

CONCLUSION.

In conclusion we wish to point out to this Court that any discrimination of which this Appellee complains, that any restriction of which it complains, that any limitation concerning which it may raise its voice was self-imposed

by reason of the character of the service which it not only performed but which it sought to render and held itself out to render on and subsequent to June 1, 1935.

Accordingly we submit that this Appellee has no standing in this Court or any other Court to challenge the findings of the Commission as set out in its report and order under date of August 4, 1943. We submit that the Court below was in error, that the report and order of the Commission of August 4, 1943, was more than adequately substantiated by the facts and admissions of record before the Commission, and that such report and order of August 4, 1943, be reinstated and be the order of the Commission in this cause.

Respectfully submitted

B. W. La TOURETTE,
G. M. REBMAN,
818 Olive Street,
St. Louis, Missouri,
Attorneys for Regular Common Carrier Conference of the American Trucking Associations, Inc.

HOWELL ELLIS,
520 Illinois Building,
Indianapolis, Indiana,
Of Counsel.